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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE J. ARNOLD, JR., *et al.*,
Petitioners

v.

POSTMASTER GENERAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. When older employees protected by the ADEA establish that a "particular employment practice" (*Wards Cove Packing Co.* v. *Atonio*, Slip Op. at 13) has a disparate adverse impact on them, may a court dismiss their claims on the ground that the practice is not "freestanding," but is part of a policy that, taken as a whole, has not discriminated against older workers as a group?

2. (a) Did the Court of Appeals err by holding that the ADEA does not forbid an employer from selecting employees for adverse treatment on the basis of a factor which is indistinguishable from age, so long as that employer has no animus towards older workers?

(b) Even assuming that the nonexistence of animus is relevant, may a court conclude that such animus was not present on the basis of a justification for the employer's policy which the employer never articulated?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. The Inspection Service and the Career Path Policy	3
B. Proceedings in the District Court	5
C. The Court of Appeals' Opinion	8
REASONS FOR GRANTING THE WRIT	9
I. The Lower Court's Disparate Impact Holding Is Directly Contrary to *Teal* and *Wards Cove* and Its Attempted Distinction of *Teal* Creates a Split in the Circuits and Will Cause Widespread Confusion Under the ADEA and Similar Anti-discrimination Laws	11
II. The Court of Appeals' Decision that Petitioners Were Not Subjected to Disparate Treatment in Violation of the ADEA Conflicts with Decisions of This Court and the Courts of Appeals by Introducing a Discriminatory "Animus" Element into Disparate Treatment Analysis and by Accepting a Justification Which the Employer Did Not Articulate	19
CONCLUSION	24

TABLE OF AUTHORITIES

Cases Page

Airline Pilots Ass'n v. *Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *aff'd in relevant part, Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985) 11
Anderson v. *City of Bessemer City*, 470 U.S. 564 (1985) 9
Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, et al. v. *Norris*, 463 U.S. 1073 (1983) 21
Connecticut v. *Teal*, 457 U.S. 440 (1982) ..... *passim*
Costa v. *Markey*, 706 F.2d 1 (1st Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1017 (1983) 15, 16
Dace v. *ACF Indus., Inc.*, 722 F.2d 374 (8th Cir. 1983) 22
EEOC v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984) 11, 22
EEOC v. *Westinghouse Electric Corp.*, 869 F.2d 696 (3d Cir. 1989), *petition for cert. filed*, May 2, 1989 (No. 88-1770) 11, 16, 22
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 12
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 20
Holt v. *Gamewell Corp.*, 797 F.2d 36 (1st Cir. 1986) 11
Icicle Seafoods, Inc. v. *Worthington*, 475 U.S. 709 (1986) 17
Jones v. *LeeWay Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) 20
Leftwich v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983) 12
Local 53, Int'l Ass'n of Heat & Frost Insulators v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) 20
Lorillard v. *Pons*, 434 U.S. 575 (1978) 11
Los Angeles Dept. of Water & Power v. *Manhart*, 435 U.S. 702 (1978) 12, 21
Massarsky v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983) 11, 15, 16

TABLE OF AUTHORITIES—Continued

	Page
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	12, 21
Norris v. *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, et al.*, 671 F.2d 330 (9th Cir. 1982), *aff'd in relevant part*, 463 U.S. 1073 (1983)	20
Phillips v. *Martin Marietta Corp.*, 400 U.S. 542 (1971)	12
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	17
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	23
Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985)	21
Wards Cove Packing Co. v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (June 5, 1989)	*passim*
Statutes	
5 U.S.C. § 8335(b)	5
28 U.S.C. § 294(d)	9
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(a)(1)	8
28 U.S.C. § 1331	1
29 U.S.C. § 623(a)(1)	2, 11, 21
29 U.S.C. § 623(f)(1)	22
29 U.S.C. § 633a(a)	1, 2, 13
42 U.S.C. § 2000e-2(a)(2)	11
Other Authority	
Fed. R. Civ. P. 23(b)(2)	6
Fed. R. Civ. P. 42(a)	6
Fed. R. Civ. P. 52(a)	9

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 863 F.2d 994, and is reprinted at pp. 1-38 of the separately bound Appendix ("A.").[1] The opinion of the District Court is reported at 667 F. Supp. 6, and is reprinted at A. 39-87. The Court of Appeals' orders denying rehearing and rehearing *en banc* are at A. 88-90.

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 633a. The judgment of the Court of Appeals was entered on December 20, 1988. The Court of Appeals denied petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc on March 2, 1989. On May 22, 1989, Chief Justice Rehnquist extended the time for filing this petition to and including June 30,

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[1] The trial transcript is cited as "Tr. ——." Plaintiffs' exhibits from the trial are cited as "Pl. Exh. ——."

1989. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act of 1967, 81 Stat. 603, as amended, 29 U.S.C. §§ 623 and 633a (the "ADEA" or the "Act"):

> § 623. Prohibition of age discrimination
>
> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; * * *
>
> § 633a. Nondiscrimination on account of age in Federal Government employment
>
> (a) Federal agencies affected
>
> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) * * * in the United States Postal Service * * * shall be made free from any discrimination based on age.

STATEMENT OF THE CASE

This case arises from the decision of respondent United States Postal Service ("Postal Service") to solve a manpower shortage in New York, Los Angeles and twelve other Major Metropolitan Areas ("MMAs") by ordering the involuntary transfer of its most senior employees to

those cities (the "senior-first rule"). Petitioners are a class of United States Postal Inspectors subject to the senior-first rule. This policy carries a high emotional and financial cost for petitioners and their families, and the District Court found that it "adversely affects the older Postal Inspectors because the cost of living and housing in New York City and the other thirteen MMAs is significantly higher" than the towns where petitioners once resided. A. 44. The District Court and the Court of Appeals agreed that the practice of directed (involuntary) transfer based on seniority ensured that the oldest employees would be transferred to the MMAs. However, whereas the District Court held that this violated the ADEA under both disparate impact and disparate treatment theories, the Court of Appeals excused the Postal Service's action on the ground that the senior-first rule was not a "freestanding employment practice" and for that reason could not be challenged separately by petitioners.

A. The Inspection Service and the Career Path Policy

The Postal Inspection Service is the audit and law enforcement arm of the Postal Service. Its employees, known as Postal Inspectors, are responsible for ensuring the safety of the U.S. mail and postal employees. The Inspection Service is administered by the Chief Postal Inspector, who reports directly to the Postmaster General, and is divided into Regions and then into Divisions. Each Division consists of "domiciles," which are the individual city offices of the Inspection Service, staffed by Postal Inspectors. A. 46.

After eleven weeks of training, a new Postal Inspector spends one year as a level 17 Inspector, one year at level 19, and two years at level 21 before receiving an automatic promotion to level 23, which is the highest non-administrative post for an Inspector.[2] The significant

[2] This promotion schedule took effect in late 1983. Prior to 1983, Inspectors were promoted from level 17 to level 19 after

difference between Level 21 and Level 23 Inspectors is the work they are assigned. Level 21 Inspectors receive assignments in all four of the "functional areas" of audit, fraud and prohibited mailings, external crimes (committed against the Postal Service by non-employees) and internal crimes (committed against the Postal Service by employees). Level 23 Inspectors specialize in a single functional area and receive assignments only in that area. A. 47.

In 1978, the Inspection Service faced difficulty in staffing its domiciles in New York, Los Angeles and Chicago with Level 23 Inspectors. The Postal Service chose to fill its need for more Inspectors by creating what it called the Career Path Policy ("CPP"). Under the CPP, a vacancy in an MMA was filled as follows: First, the Postal Service sought volunteers for the position from among all Level 23 Inspectors. The first Inspector to volunteer was awarded the vacancy. Seniority was not considered. Second, if the vacancy was not filled by volunteers, the Postal Service advertised the position nationwide for bid by Level 21 Inspectors for promotion to the Level 23 position in that MMA. If only one Level 21 Inspector applied, he received the position as long as he met the minimum requirements for promotion to Level 23. If more than one Level 21 Inspector applied for the position, it was awarded to the most qualified (not the most senior) bidder. Third, if the volunteer or bid system failed to fill the vacancy, the Postal Service *directed* the most senior Level 23 Inspector in the nation to transfer to the vacant position. A. 48-50.

At trial, Chief Inspector Clauson testified that he knew, prior to adoption of the senior-first rule, that the more senior Inspectors were also the older Inspectors. A. 73,

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one year of satisfactory service, from level 19 to level 21 after one and a half years of service, and were promoted to level 23 on a competitive basis regardless of the amount of time served at level 21. A.47.

74, 79, 83. In practical terms, this meant that he knew that older Inspectors would be placed at the top of the transfer list, and unless all vacancies were filled by volunteers, older Inspectors would be the first transferred involuntarily. In fact, the first twenty Inspectors so transferred under the senior-first rule were all over the age of 40. (Pl. Exh. 52) Chief Inspector Clauson's testimony formed the basis for the District Court's finding (not disturbed on appeal) that "seniority was used as a proxy for age." A. 82.

The CPP states that it is Inspection Service "policy" that all Inspectors serve five years in an MMA. A. 5. In fact, an elaborate series of exceptions excluded many Inspectors from that obligation. Indeed, respondent's expert witness testified at trial that in light of those exceptions, "it is simply not true that everyone eligible was going to go" to an MMA. (Tr. 301-02) As the District Court found, the exceptions included: (a) a two-year exemption for any Inspector who relocated, (b) a permanent exemption for all Inspectors who had previously served five (originally two) years in an MMA, even if they had done so as trainees, and (c) all Inspectors within five years of retirement received permanent exemptions. A. 49-50. The last provision meant that any Inspector not transferred by the end of his fifteenth year of service[3] gained a permanent exemption. Any given Inspector had a better chance of acquiring exempt status if he was placed at the bottom of the transfer list than if he was placed at the top of the list. Senior Inspectors were placed at the top.

B. Proceedings in the District Court

The senior-first rule created obvious hardships for petitioners, most of whom had lived with their families for years in their present towns and cities, and all of whom

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[3] As federal law enforcement officers, Postal Inspectors are entitled to retire after reaching the age of 55 or twenty years of service. 5 U.S.C. § 8335(b).

faced a substantial increase in the cost of living in the cities to which they received directed transfers. A. 44, 75. Petitioners filed complaints with respondent and then with the Equal Employment Opportunity Commission, alleging that the senior-first rule violated the ADEA under theories of both disparate treatment and disparate impact. Two separate groups of plaintiffs then filed suit against the Postal Service in the United States District Court for the Middle District of Florida (in 1982) (the Netherton action) and the District of Columbia (in 1985) (the Arnold action). The Netherton action was transferred to the District of Columbia in 1985, and the cases were consolidated by consent of the parties pursuant to Fed. R. Civ. P. 42(a). A. 50-53. Prior to trial, the District Court denied cross-motions for summary judgment and certified petitioners' claims as a single class action pursuant to Fed. R. Civ. P. 23(b)(2). A. 53-59.

At a three-day trial, plaintiffs' expert (Dr. Charles Mann) presented a number of statistical analyses, each of which established that the senior-first transfer rule fell more harshly on older Inspectors. Dr. Mann's testimony was not directly challenged by the Postal Service's expert, Dr. Beckett, who instead concentrated on attempting to establish that the Career Path "package," taken as a whole, did not discriminate. The District Court accepted Dr. Mann's testimony in finding that petitioners had made out cases of disparate impact and disparate treatment. A. 68-75.

First, Dr. Mann and Dr. Beckett agreed that there was a statistically significant correlation between age and seniority among Level 23 Postal Inspectors. This correlation remained significant whether one examined all Level 23 Inspectors eligible for transfer, all Level 23 Inspectors, or all Inspectors regardless of grade. Indeed, the level of significance was always such that the odds are less than 1 in 1,000 that the correlation could have occurred by chance. A. 72-73.

Second, Dr. Mann testified (and Dr. Beckett agreed) that Inspectors 40 years of age and older were disproportionately placed in the top two deciles of the directed transfer list. Again, the odds that this disparity could be explained by chance were less than 1 in 1,000. Chief Inspector Clauson conceded that, before the senior-first rule was implemented, he knew older Inspectors were represented at the top of the transfer list in disproportionate numbers. A. 73-74.

Third, Dr. Mann testified that a comparison of those Level 23 Inspectors who received directed transfers with those who were eligible for directed transfers revealed that those receiving transfers were disproportionately 40 years of age or older. A. 74. Using a different (and, as the District Court held, invalid) statistical method, Dr. Beckett nonetheless reached the same conclusion. A. 74-75.

The Postal Service's contrary statistical evidence is easily summarized. It consisted of Dr. Beckett's testimony that if one compared the percentage of Inspectors transferred who were 40 years of age or older to the percentage of older Inspectors in respondent's total work force (including those who were not eligible for transfer) there was no disparity over time. Dr. Beckett also used an invalid statistical technique. Therefore, petitioners argued, and the District Court found, that his statistical analysis should be accorded little or no weight. The methodology used by Dr. Beckett, and its flaws, are described in detail in the District Court's opinion at A. 68-71. The Court of Appeals did not disturb the District Court's findings as to Dr. Mann's conclusions or the flaws in Dr. Beckett's approach.

The District Court concluded that the senior-first rule violated the ADEA under both disparate treatment and disparate impact analysis. First, the District Court concluded that seniority, like age, is a function of time and that seniority is a proxy for age rather than a neutral factor. The Postal Service admitted that it was well

aware of this relationship when it implemented the senior-first rule. It nevertheless adopted the rule even though it had no legitimate need to transfer the most senior Inspectors and, when given a choice (*i.e.*, when two or more Inspectors volunteered for a single position) did not select the most senior Inspector. These factors convinced the District Court that the Postal Service intentionally transferred its oldest Inspectors to the least desirable assignments, thereby violating the ADEA. A. 81-84.

Alternatively, the District Court, in agreement with every court to consider the issue, held that a violation of the ADEA could be established by a showing of disparate impact.[4] The District Court rejected the Postal Service's defense and thus found that plaintiffs' statistics "proved the obvious—that the senior-first rule, by directing the most senior postal inspectors to the larger and more expensive cities, falls more harshly on [plaintiffs] . . . than on postal inspectors under 40 years of age." A. 72. Finally, the District Court concluded that defendant's own admissions negated the Postal Service's business necessity defense and established that a nondiscriminatory alternative (ranking by random selection) would have met all legitimate needs of the Postal Service. The District Court left the question of damages to a separate proceeding and enjoined respondent from further use of the senior-first rule. A. 87. Respondent appealed pursuant to 28 U.S.C. § 1292(a)(1).

C. The Court of Appeals' Opinion

By a 2-to-1 vote, the Court of Appeals (Buckley, J.) reversed the District Court, concluding that it had "erred by focusing solely on the senior-first rule." A. 9. Instead, the majority thought that the appropriate focus was on "the CPP transfer plan as a whole" (A. 10);

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[4] Because the Court of Appeals decided the case on the ground that no disparate impact existed, it did not address this point.

it rejected the contention that *Connecticut* v. *Teal*, 457 U.S. 440 (1982) precluded such bottom line analysis on the basis that "the senior-first rule was not a freestanding element of an employment program." A. 9-10. Because the percentage of all transferees (both voluntary and involuntary) who were 40 or older was roughly equal to the overall percentage of older Inspectors eligible for transfer, the majority concluded that no disparate impact existed. A. 9. The majority also reversed the District Court's disparate treatment finding, reasoning that "[b]ecause the senior-first rule does not stand alone * * * it is neither fair nor reasonable to judge the motives of the Inspection Service by uncoupling the rule from the other aspects of * * * [the] program." A. 11. From this premise, the majority concluded that the purpose of the CPP, as a whole, was a legitimate one, and the senior-first rule merely "establish[ed] a rational and orderly system to ensure that all level 23 inspectors serve a tour of duty in an MMA prior to retirement." *Id.*

Judge Garth, sitting by designation pursuant to 28 U.S.C. § 294(d), would have affirmed the District Court on the ground that its factual findings—that the senior-first rule had both the purpose and effect of discriminating against older Inspectors—were not clearly erroneous and therefore could not be reversed under Fed. R. Civ. P. 52(a) and *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985). A. 21-22. He also concluded that *Teal* required that the senior-first rule be separately examined, and found the majority's attempted distinction of *Teal* "wholly unpersuasive." A. 25-26.

REASONS FOR GRANTING THE WRIT

In reaching the conclusion that an employer does not violate the ADEA by selecting its most senior employees, whom it knows to be its oldest employees, to bear the burden of undesirable and compelled transfers, the court below has overthrown established principles of antidis-

crimination law in both its disparate-impact and disparate-treatment branches. The Court of Appeals' reversal of the District Court's disparate-impact holding because it "focus[ed] solely on the senior-first rule" instead of the employer's transfer policies "as a whole" is directly contrary to *Connecticut* v. *Teal*, 457 U.S. 440 (1982), which holds that a discriminatory method of selection may not be justified merely because the "bottom-line" result is neutral. When it so ruled, the court below did not have the benefit of this Court's recent decision in *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (June 5, 1989). The Court of Appeals' reasoning is diametrically opposed to the holding in that case that a plaintiff *may not* attack the overall result of an employer's policy, but *must* challenge particular practices as discriminatory.

The lower court's rejection of the District Court's disparate treatment finding because the employer's overtly discriminatory classification was not motivated by animus toward older workers is contrary to the fundamental proposition that employers may not lawfully classify workers on the basis of age, race or sex, and that their motive for doing so is irrelevant. Additionally, in finding no animus the lower court impermissibly relied on a justification never proffered by the Postal Service.

By departing so drastically from well-settled principles, the Court of Appeals' decision necessarily conflicts with numerous decisions of other circuits and of this Court. Unless promptly corrected, this decision will create widespread confusion among the lower courts as to the proper application of the ADEA and Title VII. Accordingly, that decision should be reviewed and reversed by this Court.

I. The Lower Court's Disparate Impact Holding Is Directly Contrary to *Teal* and *Wards Cove* and Its Attempted Distinction of *Teal* Creates a Split in the Circuits and Will Cause Widespread Confusion Under the ADEA and Similar Antidiscrimination Laws.

A. The Court of Appeals reversed the District Court's disparate-impact finding on a single ground: "the senior-first rule was not a freestanding element of an employment program." A. 9-10. This holding was without citation to precedent and is contrary to *Teal* and to *Wards Cove*, which followed and elaborated on *Teal*.

As five Courts of Appeals have squarely held,[5] and the Court of Appeals did not dispute, *Teal* applies with equal force in ADEA actions. For the ADEA, like Title VII, "protects individual rather than group rights." *EEOC v. Westinghouse Electric Corp.*, 869 F.2d 696, 705-06 n.15 (3d Cir. 1989), *petition for cert. filed*, May 2, 1989 (No. 88-1770) (citing *Teal*). *Compare* 29 U.S.C. § 623(a)(1) (it is unlawful to "discriminate against any *individual* * * * because of such *individual's* age") *with* 42 U.S.C. § 2000e-2(a)(2), quoted in *Teal*, 457 U.S. at 445-46 (unlawful to "deprive any *individual* of employment opportunities * * * because of such *individual's* race, color, religion, sex or national origin") (emphasis added). As this Court recognized in *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978), "the [substantive] prohibitions of the ADEA were derived *in haec verba* from Title VII."

In *Teal*, this Court examined Connecticut's requirement that all applicants for promotion pass a written

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[5] *Holt* v. *Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984); *Airline Pilots Ass'n* v. *Trans World Airlines, Inc.*, 713 F.2d 940, 953 (2d Cir. 1983), *aff'd in relevant part, Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985) ("that some [individuals] were successful in complying with the company's discriminatory transfer policy * * * cannot excuse the denial of equal opportunity to other members of the protected class"); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 121-22 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983);

examination to be eligible for further consideration. Because pass rates for blacks were significantly lower than for whites, the examination excluded a disproportionate number of blacks. A group of black employees who had failed the examination sued. Connecticut defended on the ground that, of the employees who had passed the test, more blacks than whites were actually promoted and therefore, the "bottom line" was that blacks were promoted in proportion to their numbers in the work force. Emphasizing that Title VII protects individuals, not groups, from discrimination,[6] the Court held that those black employees who failed the test were discriminated against and that such discrimination was not cured because other blacks were favored by post-test procedures.

In the instant case, petitioners made the showing required by *Teal*, but the Court of Appeals held this proof to be insufficient on the single ground that, "unlike the pass-fail test at issue in *Teal*," the senior-first rule was not a "freestanding" employment practice. A. 9-10. Therefore, petitioners could prevail under disparate im-

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Leftwich v. *Harris-Stowe State College*, 702 F.2d 686, 691 (8th Cir. 1983) (restriction on the number of tenured professors who would be rehired violates the ADEA even though the average age of the restructured faculty was equal to the average age of the original faculty).

[6] This proposition, which rested primarily on the language of Title VII, was further buttressed by citation to *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579 (1978) ("the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force"), *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978) (fairness to women as a group could not justify unfairness to an individual woman), and *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (a rule barring the hiring of married women with preschool children could not be justified on the ground that eligible women were hired in sufficient numbers that they constituted 75 to 80 percent of all employees).

pact analysis only by demonstrating that the transfer program taken as a whole had a disproportionate impact on older Inspectors. This "freestanding" concept is merely a new formulation of the discredited "bottom line" theory and therefore conflicts with both *Teal* and *Wards Cove*.

Teal precludes an employer from defending a challenge to a single discriminatory step in an employment program by pointing to the bottom-line result produced by that and other steps. Here, neither of the first two steps of the CPP (voluntary transfers and promotions) produced an adverse impact on older Inspectors. The third step (involuntary transfer of the most senior Inspectors) concededly did. Just as the harm to individual black employees who failed the promotion test in *Teal* was not cured because a large number of other blacks were ultimately promoted, the harm to individual, older Inspectors was not cured because a large percentage of the voluntary transferees were relatively younger. The same senior (and hence older) Inspectors would have been transferred against their will even if a larger proportion of the volunteers had been older.[7] In these circumstances, the lower court's insistence that plaintiffs could not separately challenge the adverse effect of the senior-first rule on them is merely another way of saying that one should analyze the ultimate outcome (*i.e.*, "the bottom line") of a selection process, rather than analyzing each element involved. That analysis, however, is exactly what *Teal* disapproved.[8]

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[7] If a greater percentage of voluntary transferees had been senior to petitioners, the only impact would have been that petitioners would have been higher on the seniority list and, consequently, would have been transferred sooner. If a greater percentage were junior, there would have been no impact. Petitioners could have avoided transfer only if the total number of volunteers (of whatever age) were large enough to fill all MMA vacancies.

[8] The same result follows from the language of the ADEA, 29 U.S.C. § 633a(a), which commands that "[*a*]*ll* personnel actions

In *Wards Cove Packing Co.* v. *Atonio*, —— U.S. ——, 109 S. Ct. 2115 (June 5, 1989), this Court reaffirmed *Teal* and held that a Title VII plaintiff *must* challenge a specific, identified employment practice as discriminatory. In doing so, this Court rejected the plaintiffs' attempt to build their *prima facie* case from evidence that *on the whole*, an employer's practices had excluded minorities from the workforce:

> Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. Just as an employer cannot escape liability under Title VII by demonstrating that, "at the bottom line," his work force is racially balanced (where particular hiring practices may operate to deprive minorities of employment opportunities), see *Connecticut* v. *Teal*, 457 U.S., at 450, a Title VII plaintiff does not make out a case of disparate impact simply by showing that, "at the bottom line," there is racial *imbalance* in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII. [Slip op. at 12-13, emphasis in original.]

Conversely, the Court explained that "even if [the employer] could show that the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, [the employees] would still have a case under Title VII, if they could show that *some particular hiring practice* has a disparate impact on minorities, notwithstanding

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* * * shall be made free from any discrimination based on age." The use of the senior-first rule to direct the transfer of the oldest Inspectors to positions shunned by their fellow employees (since the post had not been filled by volunteers or through promotion) was undeniably a "personnel action." Under the reasoning of the Court of Appeals, however, it was immune from challenge.

the bottom-line racial balance in [the employer's] workforce. See *Teal*, *supra*, at 450 * * *." *Id.* at 9 n.8, emphasis added.

Wards Cove thus reemphasized that both the plaintiff and the defendant must focus on "specific or particular" employment practices. By focusing on the senior-first rule, petitioners proved their case consistent with the law as established by this Court. It was therefore error for the Court of Appeals to hold that petitioners and the District Court should have focused on "the CPP as a whole," and its decision should not be permitted to stand.

B. Not surprisingly, the decision below is also in conflict with the interpretation of *Teal* by other circuits. At least two Courts of Appeals have held that *Teal* requires analysis of the *first step* of an employment program which produces a disparate impact on a protected class. In *Costa* v. *Markey*, 706 F.2d 1 (1st Cir. 1982) (en banc), *cert. denied*, 464 U.S. 1017 (1983), the First Circuit considered a town's selection process for police officers. The first step of the process excluded all applicants under five feet, six inches in height; later steps considered only women for certain positions. Plaintiff Costa applied for one such "women-only" job, but was rejected because she failed to meet the height requirement. The First Circuit, sitting *en banc*, held that *Teal* requires that "[t]he Court's focus must be on the first step in the employment process that produces an adverse impact on a group protected by Title VII, not the end result of the employment process as a whole." 706 F.2d at 4-5.

Likewise, in *Massarsky* v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983), the Third Circuit held that "*Teal* stands for the proposition that an employment practice must be analyzed at the first step in the employment process that produces an adverse impact on a protected group, not the end result of the employment process as a whole." 706 F.2d

at 122. Quite recently the same court, in *EEOC* v. *Westinghouse*, *supra*, expressly rejected an employer's argument that its denial of severance pay to older employees was justified by the fact that other older workers received early retirement benefits in lieu of severance pay:

> That fact is irrelevant. The ADEA protects individual rather than group rights: it is unlawful for an employer to 'discriminate against any *individual* . . . because of such individual's age.' 29 U.S.C. § 623 (a)(1) (emphasis added). *See also Connecticut* v. *Teal*, 457 U.S. 440, 453-55 . . . Therefore a violation can occur despite the fact that some members of the group were treated as favorably as non-protected employees. [869 F.2d at 705-06 n.15.]

The decision herein directly contravenes these holdings. Under *Massarsky* and *Costa*, the first step of the CPP which produced an adverse effect on older Inspectors was the senior-first rule. Those decisions therefore would require that this rule be the subject of disparate impact scrutiny. Yet the District of Columbia Circuit has here reversed the District Court for conducting the precise analysis which the First and Third Circuits mandate.

C. Certiorari should be granted also because the Court of Appeals has injected a new concept into Title VII analysis—"freestanding"—but has failed to give it content which would enable the courts (and employers and employees) to differentiate between lawful and unlawful employment practices. Although we submit, for the reasons stated above, that it would have been impossible for the Court of Appeals to distinguish the present case from *Teal*, there may well be situations in which criteria for the allocation of benefits or burdens among employees are so closely related that it would be wholly artificial to treat them separately for the purpose of Title VII or ADEA analysis. If so, it is essential that this Court expound a principled basis for determining whether a given selection process may or may not be challenged or defended as a whole. Such characterization takes on additional

significance in light of the holding in *Wards Cove* that a plaintiff not only *may* establish a claim by identifying the specific practice by which he was adversely affected (as in *Teal*), but that he *must* do so. The Court of Appeals, however, provided no definition of "freestanding" practices.

The lower court's only explanation of why the senior-first rule is not "freestanding" was that:

> Under the CPP, every level 23 employee was expected to spend five years in an MMA. Thus, each level 23 employee can fulfill this uniform service requirement through *either* an early voluntary or a later involuntary transfer. [A. 10, emphasis in original.]

On this view, the *involuntary* transfers of the more senior employees could not be treated separately because they were part of a "Policy" which "was expected" to have certain consequences—namely, that each employee would at some point spend five years in a major metropolitan area. But under a disparate impact analysis, which focuses on the actual *effect* on protected employees, a mode of analysis which directs attention to the employer's *expectations* is fundamentally fallacious. Thus, the Postal Service's expectations cannot justify its discriminatory practice in this case. Nor can the Court of Appeals' reliance thereon provide a legitimate basis whereby future courts can differentiate those employment practices which are to be treated as "freestanding" from those which must be treated as integrated. Moreover, even if what the Court of Appeals deemed to have been the Postal Service's "expectations" had conformed to reality,[9] it would be unsound in principle to hold that

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[9] The Court of Appeals did not find that *in fact* all inspectors would ultimately have to spend five years in an MMA; nor could the court properly have so found. First, this Court has instructed: "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings." *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709,

the *involuntary* transfer of older senior employees may not be challenged separately because other, junior, employees transfer voluntarily. An involuntary relocation is far more onerous than—and therefore not legally equivalent to—a *voluntary* move early in an employee's career, especially if this voluntary transfer is accompanied by an automatic promotion; see p. 4, *supra*.[10]

The Court of Appeals' approach is unsound in yet another respect. If, notwithstanding *Teal* and *Wards Cove*, a disparate-impact claim by a protected group may

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714 (1986); see also, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982). Second, the uncontroverted evidence precludes such a finding: The District Court found (A.49), and the Court of Appeals acknowledged (A.5), that the CPP contained an elaborate series of exceptions; Inspectors qualifying for those exceptions were not transferred. More significantly, not even all eligible employees were required to serve. Some—those who did not volunteer and were *low enough* in seniority to avoid transfer—were never transferred. The Postal Service's own expert conceded at trial that "*it is simply not true that everyone eligible was going to go*" to an MMA. (Tr. 301-02 (emphasis added)).

[10] The mischief which the Court of Appeals invites may be illustrated by an example. If an employer had one particularly odious task and imposed a universal requirement that each of its 100 employees must perform that task for one month, no one would suggest that it had discriminated unlawfully. If, however, that same employer decreed that its 20 black employees must perform the task first (and therefore none of its white employees would be forced to perform that task for 20 months), virtually everyone would agree that illegal racial discrimination had occurred. The result would not change if the employer first solicited volunteers and, after the list of volunteers was exhausted, assigned the task to blacks first. Nor would the result change if, instead of expressly selecting employees on the basis of race, the employer selected them by reference to a criterion (e.g., predisposition to sickle-cell anemia) that resulted in blacks being selected first. The Court of Appeals' analysis, however, would permit such a system because every employee would be "expected" to eventually perform the odious task, and at the end of 100 months the percentage of blacks assigned the task would be no greater than their overall percentage in the work force. Nothing in the antidiscrimination statutes or this Court's interpretation thereof can sanction such a result.

be rejected because in some (thus far undefined) class of cases the plaintiffs should have focused on the entire policy, that policy itself must be designed so that no disparate impact can occur if it is applied according to its terms. Respondent's Policy fails on this ground as well. If a lesser number of the junior Inspectors had transferred voluntarily, the percentage of Inspectors transferred *involuntarily* would have constituted a greater proportion "of all Inspectors transferred, either voluntarily or involuntarily." A. 9. The Policy would then have had "a disparate impact on the protected class" even under the Court of Appeals' approach. Likewise, if, due to a larger number of unfilled MMA openings, the Postal Service had transferred more Inspectors, these would have had to come from the transfer list; since the most senior employees were at any time at the top of that list, the proportion of senior employees transferred would have been that much greater. Thus, it was a mere fortuity, rather than an inherent characteristic of the Policy, that at the time of suit, the proportion of younger to older transferees matched that of the eligible workforce. Such a policy is not inherently neutral, and cannot provide a defense where its effect is to disadvantage individuals who are protected by the ADEA. And a decision approving such a policy will inevitably sow confusion in suits under the ADEA and other simiiar antidiscrimination statutes.

II. The Court of Appeals' Decision that Petitioners Were Not Subjected to Disparate Treatment in Violation of the ADEA Conflicts with Decisions of This Court and the Courts of Appeals by Introducing a Discriminatory "Animus" Element into Disparate Treatment Analysis and by Accepting a Justification Which the Employer Did Not Articulate.

A. The Court of Appeals' reversal of the District Court's disparate treatment holding requires review because it is contrary to the hitherto unquestioned principle that "facially discriminatory practices are intentional dis-

crimination * * * regardless of the subjective motivation," *Norris* v. *Arizona Governing Committee*, 671 F.2d 330, 334 (9th Cir. 1982), *aff'd in relevant part*, 463 U.S. 1073 (1983), and because it conflicts directly with the decisions of other circuits that an employer engages in intentional age discrimination when it classifies employees on the basis of a factor that is a proxy for age.

Based on the *admission* of Chief Postal Inspector Clauson that, before he adopted the senior-first rule, he *knew* that the more senior Inspectors were the older Inspectors and therefore he *knew* that the senior-first rule would select the older Inspectors for directed transfer (A. 73-4, 79, 83), the District Court found that seniority was merely a "proxy" for age. Therefore, the Postal Service impermissibly directed transfers "because of age" in violation of the ADEA.[11] A. 81-82. The Court of Appeals did not disturb the District Court's finding that the Postal Service knew that seniority was a proxy for age. It nonetheless rejected the ultimate conclusion that selection on the basis of seniority amounted to intentional age discrimination because it felt that, viewed in the context of the overall transfer program, "the Inspection Service's refusal to substitute a system of random selection for its senior-first rule [was] both rational and devoid of any implication of animus." A. 11. That ruling, which per-

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[11] The District Court's finding—that action based on a factor which the Postal Service knew was a proxy for age violated the ADEA—was consistent with precedent under Title VII. Before the Supreme Court decided *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), the courts regularly applied disparate treatment analysis to find violations of Title VII when an employer used criteria which were inherently related to race. *See, e.g., Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (rule prohibiting transfer between units where the employer's work force had traditionally been segregated into units by race); *Local 53, Int'l Ass'n of Heat & Frost Insulators* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) (all-white union which restricted new membership to sons and close relatives of present members). *See also*, cases cited at p. 22, *infra*, for similar decisions under the ADEA.

mits personnel decisions to be made on the basis of age just as long as they are not irrational and are not the result of animus toward older workers, is contrary to the words of the statute and to elementary principles governing employment discrimination law. Unless promptly corrected, this innovation will invite inappropriate and wasteful litigation about employers' subjective motivations.

The ADEA does not require proof of animus or ill-will toward older workers to establish intentional discrimination. Rather, it prohibits personnel actions taken "*because* of [an] individual's age." 29 U.S.C. § 623(a)(1). Given the language of the ADEA, which is virtually identical to the language of Title VII, *supra* at 11, no court has previously suggested that it is permissible to classify workers on the basis of age, race or gender so long as that classification is not motivated by animus to the protected group. Indeed, this Court's decisions establish the opposite: "Congress has decided that classifications based on sex, like those based on national original or race, are unlawful." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 709 (1978). *Accord*, *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1084 (1983) ("We continue to believe that 'a statute that was designed to make race irrelevant in the employment market' could not reasonably be construed to permit such a racial classification") (citation omitted). The lower court's focus on animus is also irreconcilable with the tripartite evidentiary scheme articulated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under *Green* and its progeny, the plaintiff is not required to prove that the employer had acted with animus against him or the protected group, and it is no defense for the employer that he acted without such animus. Thus where, as here, "there is direct evidence that the method of transfer * * * depends upon [a plaintiff's] age," no more is required to establish a violation. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111,

121 (1985). In requiring more, the lower court excused conduct which was illegal under long-established principles.

Additionally, the Court of Appeals' departure from the general understanding of what constitutes disparate treatment inevitably created a conflict with numerous decisions of other circuits. Precisely in point are the decisions of three other circuits which have held that, regardless of an employer's motive, it may not classify employees on the basis of a factor that is a proxy for age. *EEOC* v. *Westinghouse*, *supra*, 869 F.2d at 706 (employer may not deny severance benefits to employees eligible for retirement where eligibility for retirement correlates closely with age); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1393 (9th Cir. 1984) (same); *Dace* v. *ACF Indus., Inc.*, 722 F.2d 374, 378 (8th Cir. 1983) (disparate treatment case holding that "discrimination on the basis of factors, like seniority, that invariably would have a disparate impact on older employees is improper under the ADEA").

B. The Court of Appeals' disparate treatment holding constitutes a fundamental departure from accepted principles in two other respects. The Court of Appeals suggests that the Postal Service's decision to select its oldest Inspectors for involuntary transfer can be excused because that rule was necessary "to establish a rational and orderly system to ensure that all level 23 Inspectors serve a tour of duty in an MMA prior to retirement." A. 11. As the above discussion illustrates, however, *overt* discrimination can never be justified on the ground that it was necessary to achieve an employer's business goals.[12]

Moreover, that justification was never offered by the Postal Service, but was articulated for the first time by

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[12] The sole exception to this rule is the bona fide occupational qualification defense of 29 U.S.C. § 623(f)(1). Neither the Postal Service nor the Court of Appeals relied on that exception.

the panel majority.[13] This Court's precedent establishes that such judicial advocacy is improper. *See, e.g., Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 (1981) ("the *defendant* must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection" (emphasis added)). *See also Wards Cove*, slip op. at 15-16 (employer bears burden of production for business justification in disparate impact case; this "conforms to the rule in disparate-treatment cases" that employer must assert "a legitimate neutral consideration" that accounts for employment decision). This carefully crafted and principled allocation of burdens would fall into complete disarray if courts could sustain an employer's action on the basis of a justification never mentioned by the employer.

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[13] The Postal Service's asserted justifications for the senior-first rule in the District Court and the Court of Appeals were (1) it needed the most experienced Inspectors in MMAs, (2) it needed a perpetual system and (3) it needed a selection factor that was predictable in the sense that it let employees know where they stood on the transfer list. A. 17, 76. The first reason is clearly pretextual because, under the CPP, the preferred method of filling MMA vacancies is by voluntary transfer of any Inspector and, when given a choice between volunteers, the Postal Service selected the one who applied first, *not* the most experienced. A. 48-50, 76-77. Likewise, the District Court found that the Postal Service's need was for "level 21 or level 23 postal inspectors *of any seniority*" (emphasis in original). A. 77. And, predictability and perpetuity could be ensured merely by maintaining a permanent transfer list, with Inspectors chosen for transfer by random selection.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted. The case should be set for briefing and argument or alternatively remanded for reconsideration in light of *Wards Cove Packing Co.* v. *Atonio.*

Respectfully submitted,

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